In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 589

V. P. SERODINO, INC., APPELLANT

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission, move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment entered on June 17, 1955, by a three-judge district court convened pursuant to 28 U. S. C. 2284, 2325, dismissing a complaint seeking to set aside an order of the Interstate Commerce Commission. The Commission's order required appellant to cease and de-

sist from engaging in interstate transportation by water of iron and steel scrap without the certificate or other form of authority required by Section 309 of the Interstate Commerce Act, 49 U. S. C. 909. The order was predicated upon the Commission's finding that scrap is not a commodity transported "in bulk" within the meaning of the exemption provisions of Section 303(b) of the Act, 49 U. S. C. 903(b).

Three certificated common carriers initiated the Commission proceeding by filing a complaint alleging that appellant and Rose Barge Line, Inc.,[1] were engaged in transporting scrap iron by water without having requisite authority from the Commission (J. S. 1 B). Two other certificated water carriers, three associations of water carriers, and railroads operating in eastern territory intervened in support of the complaint (J. S. 2A). Several unregulated water carriers intervened in support of the defendants but introduced no evidence (J. S. 2B).

The examiner who heard the evidence concluded that appellant's transportation of scrap was not given exemption by Section 303(b) (J. S. 3A). Division 4 of the Commission also found that scrap was not a commodity transported "in bulk" (J. S. 1B-11B), and the full Commission denied recon-

---

[1] Rose Barge Line, Inc., had towed scrap for appellant between August 15, 1952 and February 1953, but had not subsequently transported any scrap (J.S. 2B). The Commission found it unnecessary to issue any order against this defendant (J.S. 11B) and it is not a party to the present appeal.

sideration. The three-judge district court unanimously held the Commission's order valid.[2]

The Commission found the following facts, among others:

Appellant has been engaged in transporting scrap iron in open-top barges on the Ohio and Tennessee Rivers since January 1952. Scrap is shipped by rail from the many towns and cities where waste metal accumulates and incoming carloads are consolidated at various ports into bargeloads for movement to the consignee steel mills. Nearly all of the scrap so transported has been cut, sheared, or compressed into pieces, strips, or bundles, in order to segregate different grades having different prices and values (J.S. 5B).

A bargeload is composed of scrap of "various shapes, sizes, and grades" and most of the scrap, because of its large size, is loaded and unloaded piece by piece, by crane and magnet. Scrap moved by water includes such diverse items as 33-foot steel rails, iron wheels 15 feet in diameter, ingot mold tops weighing 1,000 to 1,400 pounds apiece, locomotive wheels, and rail-car axles 88 inches long (J. S. 6B-7B).

Regulations issued by the Office of Price Stabilization specified some 35 grades of scrap of dealer and industrial origin, and 35 other grades of railroad origin. While the separate grades are generally not segregated in the barge, appellant's

[2] The court filed findings of fact and conclusions of law (J.S. 1A-6A) but did not render an opinion.

broker prepares a worksheet for each bargeload and sends the customer an invoice showing its contents. These and other facts show that a "barge of scrap generally is not one homogenous mass," but constitutes "separately valued lots" (J. S. 6B).

The country's gross steel-scrap business was about $2,000,000,000 in 1948, and much of the movement was by water, but there has been only negligible water carriage on the basis that Section 303(b) exempts such carriage from regulation (J.S. 9B). Appellant is "the only carrier identified by name that is known to be transporting scrap allegedly as an exempt bulk commodity," and the amount which it has transported was not shown (J. S. 8B).

ARGUMENT

Section 303(b) provides in pertinent part that the water carrier provisions of Part III of the Interstate Commerce Act shall not apply to commodities transported "in bulk", but that this exemption shall apply only to commodities in bulk which are, in accordance with the custom of the trade existing as of June 1, 1939, carried without "wrappers or containers" and without "transportation mark or count."

We submit that the Commission's interpretation of this section in the instant case is clearly correct. It accords with the consistent administrative construction of the section since shortly after its enactment. Such "contemporaneous construction of a statute" by the agency "charged with the responsibility of setting its machinery in motion" is

entitled to great weight. *United States* v. *American Trucking Assns.*, 310 U. S. 534, 549.

In *Mulqueen Contract Carriers Application*, 250 I. C. C. 436, 438, decided in 1942, less than two years after enactment of the water carrier provisions of Part III, the Commission ruled that the phrase "commodities in bulk" applies to those "which can be poured, scooped, or shoveled", and that it does not apply to items of such size and weight that they have to be handled piece by piece. The Commission also ruled that transportation in bulk was the "determinative factor", and that a commodity is not transported in bulk merely because it is carried without wrapper or container and without transportation mark or count.

In *Columbia Transp. Co. Contract Carrier Application*, 250 I. C. C. 653, 668 (1943), the record was found to be insufficient to permit determination of the status of scrap under Section 303(b), but the Commission reaffirmed the tests which it had applied in the *Mulqueen* case, and declared that if the scrap which was transported was compressed, and weighed in that form several hundred pounds, it "is not a commodity in bulk." A like ruling was made in *Ohio River Co. Contract Carrier Application*, 260 I. C. C. 501, 505 (1945).

The consistency of the Commission's rulings is shown by the fact that it has classified coal, sand and gravel, grains, iron ore, sulphur, soda ash, salt, and slag, as bulk commodities, and has classified as nonbulk pig iron and steel billets, and numerous processed or semiprocessed articles (J. S. 12B).

Appellant refers to *John L. Goss Corp. Contract*

Carrier Application, 250 I. C. C. 101 (1941) and *Ralph Raike Applications,* 250 I. C. C. 177 (1942) as being not in accord with the *Mulqueen* ruling (J. S. 6). But the *Goss* ruling plainly involves no such divergence, and the *Raike* ruling was made in applications to which there was no objection and on which there was no oral hearing, and the only reference to scrap iron was in listing it, along with six other commodities, as within the 303(b) exemption.

Congress enacted Section 303(b) because of its understanding that the low cost of water transportation of bulk commodities made this transportation not competitive with other rail or water operations, and that there was therefore no reason to subject it to possibly burdensome regulation; and in the hearings and debates, the commodities referred to as those which would come within the exemption were coal, grain, iron ore, and limestone, and other commodities composed of fungible units and which form a conglomerate mass when stored or carried in the holds of vessels.[3] Accordingly, the Commission's ruling that scrap iron is not a bulk commodity within the meaning of Section 303(b) squarely accords with the meaning

[3] Letter of former Commissioner Eastman to Chairman of House Interstate and Foreign Commerce Committee (Hearings on H.R. 2531 and H.R. 4862, 76th Cong., 1st Sess., pp. 1557, 1560); statements of counsel for Lake Carriers Assn., chief proponent for the Section 303(b) exemption (Hearings on S. 2009, 76th Cong., 1st Sess., pp. 491, 494, 497); H. Rep. 1217, 76th Cong., 1st Sess., p. 3; 84 Cong. Rec. 5870, 5885, 6132, 9750-1, 9980.

of the section as shown by its legislative history. In addition, the Commission's findings and order are in accord with the practices of the industry—there has been practically no water carriage of scrap iron upon the basis that it is a bulk commodity exempt from regulation (*supra*, p. 4).

Appellant's sole contention, apart from denying the existence of consistent administrative construction of Section 303(b), is that the Commission's interpretation constitutes a rejection of the "dictionary meaning" and the "natural and common import" of the words "in bulk" (J. S. 4, 6). But the factual premise for this contention is appellant's statement, made without supporting citation, that scrap is "heaped loose" in the barges which transport it (*ibid.*). This factual premise is, we submit, contrary to the Commission's findings and the established facts. Most of the scrap transported by barge is compressed in bundles of large size and weight, it is loaded and unloaded piece by piece, and it includes individual items of widely diverse shapes and sizes (*supra*, p. 3). Patently it is not and cannot be "heaped loose" into the holds of the transporting barges.

While questions of statutory interpretation are for the courts to resolve, "giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute", where the question is "one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially", the determination made by the agency

"is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130-131. We submit that in the present case the determination made by the Interstate Commerce Commission unquestionably has "warrant in the record" and "a reasonable basis in law."

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial questions. It is therefore respectfully submitted that the judgment of the district court should be affirmed.

SIMON E. SOBELOFF,
Solicitor General.
STANLEY N. BARNES,
Assistant Attorney General.
CHARLES H. WESTON,
Attorney.

ROBERT W. GINNANE,
General Counsel,
H. NEIL GARSON,
Attorney,
Interstate Commerce Commission.

JANUARY, 1956.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1956 372490 972

No. 589

FILED
JAN 23 19
HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

V. P. SERODINO, INC., *Appellant*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

MOTION OF THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., TO AFFIRM

JAMES H. MCGLOTHLIN
Covington & Burling
701 Union Trust Building
Washington 5, D. C.

JOHN W. HUDSON
Taft, Stettinius and Hollister
603 Dixie Terminal Building
Cincinnati 2, Ohio

LEWIN W. WICKES
1740 Suburban Station Building
Philadelphia 4, Pennsylvania

Counsel for Rail Carrier Appellees

January 1956.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 589

V. P. SERODINO, INC., *Appellant*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

MOTION OF THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,* TO AFFIRM

Pursuant to Rule 16 of this Court, the rail carrier appellees who intervened as defendants* in the District Court move that the judgment sought to be reviewed be affirmed on the ground that the questions

---

* The Baltimore and Ohio Railroad Company, Bessemer and Lake Erie Railroad Company, Erie Railroad Company, New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, The Pittsburgh & Lake Erie Railroad Company, The Pittsburgh & Shawmut Railroad Company, Pittsburgh & West Virginia Railway Company, and Western Maryland Railway Company.

on which the decision of the cause depends are so unsubstantial as not to need further argument.

INTRODUCTION

These appellees have examined the Motion of Union Barge Line Corporation, et al., to Affirm, and concur and join therein. The regulated carriers, rail and water, would be adversely affected by the extension of unregulated transportation in interstate commerce that appellant seeks.

NO SUBSTANTIAL QUESTION IS PRESENTED

The question on which decision of the cause depends is whether the transportation of scrap iron and steel in barges is transportation "of commodities in bulk" within the meaning of Section 303(b) of the Interstate Commerce Act [49 U.S.C. 903(b)]. That subsection exempts from regulation "transportation by a water carrier of commodities in bulk". The Interstate Commerce Commission, on a lengthy record and after full discussion in its report, held that scrap iron and steel is not a "commodity in bulk" within the meaning of the exemption. The Court below affirmed without opinion. The Commission found on this record that scrap iron and steel shipments consist of individual pieces that vary greatly as to size, shape, weight, and value, and that most of the pieces must be handled separately. The Commission distinguished these commodities from homogeneous bulk commodities, such as grain, coal, and sand, that can be scooped or shoveled, and of which any part of a shipment is precisely like every other part, as is readily visualized in the case of liquid bulk commodities.

Appellant relies heavily on the sentence of Section 303(b): "This subsection shall apply only in the case

of commodities in bulk which are . . . loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count." In context, this sentence does not change or define the phrase "commodities in bulk". Commodities like grain that may be transported in bulk may also be packaged in "wrappers or containers" (such as bags) and handled subject to "transportation mark or count". The sentence quoted simply means that under such circumstances the transportation is not "of commodities in bulk". It does not mean that merely because commodities are not packaged for transportation (for instance, logs, lumber, monumental stone), they are automatically "commodities in bulk".

No substantial question for the decision of the Supreme Court is presented, and the judgment of the District Court should be affirmed without argument.

Respectfully submitted,

JAMES H. MCGLOTHLIN
Covington & Burling
701 Union Trust Building
Washington 5, D. C.

JOHN W. HUDSON
Taft, Stettinius and Hollister
603 Dixie Terminal Building
Cincinnati 2, Ohio

LEWIN W. WICKES
1740 Suburban Station
Building
Philadelphia 4, Pennsylvania

Counsel for Rail Carrier Appellees

January 1956.